

WORKERS' COMPENSATION INDUSTRIAL COUNCIL

JANUARY 9, 2014

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, January 9, 2014, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:

Kent Hartsog, Vice-Chairman

James Dissen

Dan Marshall (via telephone)

1. Call to Order

Vice-Chairman Kent Hartsog called the meeting to order at 1:00 p.m.

2. Approval of Minutes

Vice-Chairman Kent Hartsog: I'll ask for a motion to approve the November 21, 2013 minutes.

James Dissen made the motion to approve the minutes from the November 21, 2013 meeting. The motion was seconded by Dan Marshall and passed unanimously.

3. Office of Judges Report – Rebecca Roush, Chief Administrative Law Judge

Judge Roush: Good afternoon everyone. It's a pleasure to be here today. Hope everyone had a happy holiday. I did forward to you the Office of Judges' Report for the month of January which included some year-end statistics. Not too many notable things in here. I want to highlight a couple of things on the first page. We did acknowledge 258 protests for the month of December, which is relatively low, but you have to consider that we had the holiday season in there. With that, it's to be expected that the number would be low. The comparison total between 2012 and 2013 – in 2013 we acknowledged 4,612 protests, which is down approximately 100 protests from the prior year. The protests continue to decline, trending downward as we have seen over the last few years.

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The other thing I would note is the percentage of protests on the first page. The Old Fund continues to decline in the percentages – from 12% down to 10% in 2013. And another notable thing is that the self-insured protests also continue to decline with regard to percentages from 18.68% to 16.72%. The trend is again moving downward.

I'll take any questions that you may have on this report. I do have another issue to bring up, but I wanted to make certain that if you have any questions about the report I'd be happy to answer them.

Vice-Chairman Hartsog: Mr. Marshall, do you have any questions?

Dan Marshall: No, sir.

Vice-Chairman Hartsog: Mr. Dissen?

James Dissen: No, I don't.

Judge Roush: I want to point out that I've made this slide presentation for you. I wanted to bring up some issues related to the Petitions for Attorney Fees.

As you know, this law was signed into effect on July 12, 2013, which amended statute §23-5-16(c), related to attorney fees for successful recovery of the nine medical benefits in workers' comp litigation. I wanted to point out to you briefly what this has entailed for our office over the last six months. And I will apologize in advance because these comments on here may be a little confusing. The first so many actually pertain to our office. The last one relates to the Board of Review. This is the number of petitions for attorney fees and costs that have been filed with our office and the Board of Review through January 8, 2014. We received in our office the first petition on August 14, 2013. To date we've only received 19 petitions filed in our office. Of those 19, two of those were also filed simultaneously with the Board of Review, but the Board of Review had jurisdiction. We had one filed with our office which the Supreme Court had jurisdiction. Four petitions were premature as the ALJ decisions were appealed to the Board of Review. We have the nine requests for costs in five of the petitions where attorney fees were granted. I confirmed with the Board of Review yesterday the number of petitions that have been filed in their office. They have had five attorney fee petitions, and one appeal which they have accepted to an OOJ Order which granted attorney fees but denied costs. The entire impact of this new law that went into effect in July, there has only been 19 petitions filed in our office.

Vice-Chairman Hartsog: Could you bullet-point number six? I'm not sure. . . "OOJ has denied request for attorney costs in five of the petitions where attorney fees were granted."

Judge Roush: The law. . . if you go back and read it, it does allow for attorney fees as well as costs. The cost, of course, is not defined anywhere in our statute, and there is not a rule that defines it as well. In these cases where costs have also been requested, the costs pertain to expenses of the attorney. For instance, hotel expenses, mileage expenses of the attorney – not of the claimant. We have interpreted the statute to mean – it's pretty clear in my opinion – it expressly states that the costs have to be the costs of the claimant. So we have denied those requests for attorney costs that were on top of the fees that they requested. The fees have been granted, but the costs have been denied.

Vice-Chairman Hartsog: Thank you. Mr. Dissen, do you have any questions?

Mr. Dissen: I do not.

Vice-Chairman Hartsog: Mr. Marshall, do you have any questions?

Mr. Marshall: No.

Vice-Chairman Hartsog: Thank you very much. Good job.

4. General Public Comments

Vice-Chairman Hartsog: We'll move onto general public comments. I think Mr. Bill Gerwig would like to speak.

Bill Gerwig, Attorney: I was here at the last meeting talking about the problems that claimants' counsel has in getting the claims acknowledged by private carriers, and getting file material. When I hand out the language that we are recommending – I know you didn't have a chance to review that – I was hoping that there may be some questions. I also anecdotally talked about a claim that I just happened to pick up at random, and I thought I would update you on that one. To refresh your memory, the claims administrator acknowledged that a claim was filed on March 27, 2013. I issued a subpoena on August 21, 2013, for file material. On October 2, I sent a second request. On November 1, I filed a Motion to Compel at the Office of Judges. They acknowledged that motion. On November 19, they provided Zurich time to respond. There was no

response filed, and I'm still waiting for file material for a claim that was acknowledged by the claim's administrator 10 months ago. I don't know if any orders have been issued. There has been no treatment authorized. There has been no compensability ruling to my knowledge. There is just total silence from the claim's administrator. And this is not an unusual occurrence. Not having immediate access to file material – at least some forcible access to file material – makes it very difficult for me to represent a claimant; makes it difficult for the claimant to know whether he's got an accepted claim at all; to know whether he's got treatment approved; and, in fact, to get treatment performed. This is a recurring theme over and over again.

The language that I've handed out provides an obligation to provide file material. Now there are no penalties in there. There is no hardship on a claim's administrator to provide that material. Just so you know my history. . .I have been an employer's representative, and have been for years. I still have an occasional employer's claim, and there are times as an employer I need file material from another claim's administrator, and you have the same trouble getting that material. So, it is not just claimants' attorneys. There are also circumstances where, as an employer's counsel, I run into these same problems. The Office of Judges has to respond to numerous motions to compel; to enforce subpoenas; things that they shouldn't have to deal with. And I think that the language that is recommended would alleviate – if not eliminate – those kinds of wasted judicial. . .[inaudible].

If there are questions about any of the language, I would be happy to answer anything you may have.

Vice-Chairman Hartsog: Do you have any questions Mr. Marshall?

Mr. Marshall: The only question I would have is what specific recommendation Mr. Gerwig has. . .I don't happen to have his text in front of me. Would this be more of a rule making on our part? We may need some direction from our counsel as well. But should the Council decide to address this issue, how would we go about it?

Mr. Gerwig: It is recommended as a rule change. In fact, at one point in the rules there was a requirement [sort of generically] that file material had to be provided within 30 days of a request. But there is no definition of what "file material" is. There was some confusion on the insurance companies whether that was a request for "privileged information" or other attorney work product. So, in the language that is presented now we define exactly what is meant by "file material." It is essentially orders, notices, correspondence, and medical records that had been either generated by the insurance

company or received by the insurance company. But it specifically excludes any privileged material that was generated internally or from their attorneys.

Vice-Chairman Hartsog: Dan, I think the Commissioner or Mr. Pauley is planning on addressing this in detail in a few minutes when we get to old business – what their plan is, and what they are planning to propose to the Council.

Mr. Marshall: Thank you.

Vice-Chairman Hartsog: Mr. Dissen, do you have any questions?

Mr. Dissen: No. In light of the fact that they will be addressing it, I'll just hold.

Vice-Chairman Hartsog: Thank you very much.

8. Old Business

Vice-Chairman Hartsog: Mr. Pauley, are you going to address that?

Andrew Pauley, General Counsel, OIC: If I could just jump out of order briefly. We put the Safety Study on the agenda first. We are discussing the Safety Study, which is coming up again, pursuant to statute. This year we are discussing it with Mr. Tracy Smith, Director of Environmental Health and Safety at Marshall University, to possibly get a different perspective from the previous couple of years. We want to keep you apprised. Nothing has been engaged at this point. We've just merely made contact with this individual. He is checking to see if he has any conflicts or concerns. I wanted to make you aware and put his name out there. By the March meeting [of this Council] hopefully we'll have an update and a much more aggressive timeframe on getting this matter worked out – as far as the survey to the industry, to self-insured employers, moving forward in collecting information, and how we want to extrapolate that into a report.

Vice-Chairman Hartsog: Thank you. Any questions on the Safety Study that Mr. Pauley just discussed? Mr. Marshall?

Mr. Marshall: No, sir.

Vice-Chairman Hartsog: Mr. Dissen?

Mr. Dissen: No, sir.

Vice-Chairman Hartsog: Our deadline is July 1st for having it completed.

Mr. Pauley: That's correct.

Vice-Chairman Hartsog: Is there any concern that waiting until March might compress that too much in having to get responses from a lot of companies and aggregate those?

Mr. Pauley: Not at this point because we hope [between the interim] to get a lot more accomplished and get moving on the surveys and get them out. We're updating you in March about the compliance in responding to the same.

Vice-Chairman Hartsog: Thank you very much. Do you want to move onto the Access to Justice?

Mr. Pauley: Sure. Thank you. We were asked to discuss this generally. I think the way the Commissioner is approaching it at this point is we obviously take the presentation to the Council seriously. We want to thoroughly vet the proposal and make a recommendation. I think it is fairly clear in the statute, Chapter 23. The Insurance Commissioner is the one that submits proposed rule changes to the Industrial Council. If the Commissioner chooses to request a rule change, this would be Rule 1 of Title 85, Series 85, concerning handling of claims, which Mr. Gerwig has proposed. You should have in your packets the proposal. I don't know if you've had a chance to look at it, but just a brief overview. There are two components – one being acknowledgement of legal representation; two being file copies. Just briefly to recap – acknowledgement of legal representation, the proposal requests notification to take effect immediately upon receipt by the entity, which could be a self-insured employer or private carrier. They would need to acknowledge it within 15 business days; and acknowledge issuing checks directly to counsel, as the representative of the party; and provide copies of all future orders, notices, and correspondence in regards to the same; if directed by the attorney/employment contract, indemnity benefits shall be made payable to the claimant in care of the attorney named and mailed to the attorney.

The file copies – The responsible party shall mail a copy of each “document” as it comes into the file. It shall provide at no cost a complete copy “within 30 days of the request,” which would include an authorization for release from the claimant.

Claim file is defined as an application for benefits – all claim forms, all medical documents received in relation to the claim, all orders and notices issued, and all documents, records or other materials upon which claim decisions were based. And, of course, there is an exception for attorney/client communications, but it doesn't go much further than that.

The intent, and what the action of the Commissioner is at this point, is that we are getting this out to all stakeholders for comment. We have sent contact to the Self-Insured Association; the Insurance Federation that represents insurance carriers; BrickStreet, which is our largest domestic carrier; claimants' attorneys will be getting requests for their experience in regard to these matters; we've sent it out to TPA's because they are on the front lines; defense attorneys; and there may be a need for some procedural explanations potentially from the Office of Judges where they could comment, if asked, in regards to handling of the same.

This is not being inclusive, and there may be many more issues that are brought up, and many more points of discussion, but generally in looking at the proposal – first taking the acknowledgement proposal. There is a Bar requirement in the state that attorneys cannot deal with those parties that are represented, or known to be represented, but this is a different situation where potentially you have a TPA that's not under that State Bar requirement. So what is the requirement for them to acknowledge the representation of the attorney? These are long-tailed claims that have many components to them, as I'm kind of preaching to the choir here. There are components that are potentially settled; or those that continue to move through a long timeframe.

We are looking at issues like form – what the form of the acknowledgement would be to request. Are we just talking about pre or post litigation? What is done in post litigation once it's with the Office of Judges? I think that's where their input could come in, and their mechanisms for requesting the information. Obviously, our focus is to make sure the claimant is taken care of in a timely and efficient manner. Is this a claimant election? Which we think it needs to be because if it's mandatory, disengaging could be a problem. Appropriate notices because representation can go in and out; attorneys can represent people and then withdraw. We are having a benefit stream being paid to this person so we want to make sure that the checks are appropriately getting to the person who needs them. If discontinuance, there has to be appropriate notice to make sure that the person is not harmed, and sometimes these are timing issues. There are not weeks or months to work that out. And, of course, there can be fee disputes. We would have to look at the ramifications of dealing with fee disputes. The Insurance Commissioner does not regulate attorney conduct. That's regulated by the State Bar, so that would be out of our purview. Many complaints, if there are any,

would have to be referred to the State Bar for handling. But that's not necessarily going to help a claimant trying to get a potential check, if there is an issue. We're not saying there will be, but it's just things to consider.

The file copy proposal – Again, are we talking pre versus post litigation? Frequency – how many times is it entitled to be requested? If there was any type of abuse or anything like that, how would that be handled? The scope is probably the biggest detail. We want to make sure what is being requested. As I mentioned, Mr. Gerwig, there are attorney/client privilege exceptions. There is work product exceptions; other litigation type of work product that would be protected. Someone has to look at that I presume within the company – an attorney – and ascertain if that could be disclosed. There may be additional costs. We don't know. That's why we want to get input. One of those may be significant concerns.

I think some of the terminology needs clarified and worked out because some of it is rather broad; other Code sections that may be affected. Comp is a statutory beast. There are many sections in there that attempt to talk about what has to be produced throughout the Code – what type of records. We wouldn't want to trample on what's already required to be provided and those kind of things. We just have to coordinate with other parts of the Code.

Again, our intent is to seek comment on these issues for about 30 days, and then discuss internally and decide what proposal we would want to bring to the Council at the next meeting in March – any drafts or proposals – vet those out if we decide to do that, and bring it before you for review.

Vice-Chairman Hartsog: Are you asking that we put this out formally for public comment at this time?

Mr. Pauley: Sure. We have already sent it out to interested parties, but. . .

Vice-Chairman Hartsog: I understand. It has been a while since we've had a rule change come up. But I believe we need to act to put it out for filing with the Secretary of State and for public comment. Is that correct?

Mr. Pauley: Yes.

Vice-Chairman Hartsog: Mr. Marshall, do you have any questions?

Mr. Marshall: No, sir.

Vice-Chairman Hartsog: Mr. Dissen?

Mr. Dissen: Not at this time since it's going to be out for comment. In light of the fact of the recent publicity on getting medical records, and what is protected and what's not, I think we're beginning to clarify a lot of this.

Mr. Pauley: Let me just clarify that because I appreciate what you're saying. This is not an official rule at this point where we would file with the Secretary of State. It is just out for comment. The Commissioner has not made a formal proposal yet. But I agree with your thoughts that let's make sure we officially get it out there for comment and make everyone available to provide comments.

Vice-Chairman Hartsog: Well, if it's not being filed formally with us as a rule change by the Insurance Commissioner. . .I mean, I think what we do is just ask you to please circulate it and ask those that are interested to provide comments back perhaps at our next meeting and provide those to you in writing. But I'm not sure. I'll rely on what you tell me. . .whether or not we need a formal motion and action to do that since you're not wanting to put this out right now for kind of public, and filing.

Mr. Pauley: Right. . .because it's not really a rule change at this point. It will be drafted, but in a proposed rule change, and then will be submitted for what you're talking about for final, official comment. This is just to determine if we, in fact, are going to make the rule proposal to the Industrial Council for change. This is a concept right now. It's not down in actual "official" rule form at this point.

Vice-Chairman Hartsog: Okay. Because one of my next questions, are we going to get a redline version of the rule? I guess. . .the process you're wanting to take is to get informal comments before the next Industrial Council meeting, and have those presented to the Industrial Council, and then go back; and then perhaps at the next meeting come out to formally introduce a change to the rule. Am I understanding that correctly?

Mr. Pauley: Yes, sir.

Vice-Chairman Hartsog: Okay. Mr. Marshall, do you have any problems with that plan of action?

Mr. Marshall: No. I think that's fine.

Vice-Chairman Hartsog: Mr. Dissen?

Mr. Dissen: That's fine.

Vice-Chairman Hartsog: I would recommend you do that, and put it on the agenda for the next time, and hopefully we'll get a lot of feedback from attorneys, insurance companies as to how this approach might need to be adjusted.

Mr. Pauley: Certainly.

Vice-Chairman Hartsog: Thank you. Anything else under old business? Mr. Dissen?

Mr. Dissen: No, sir.

Vice-Chairman Hartsog: Mr. Marshall?

Mr. Marshall: No, sir.

6. New Business

Vice-Chairman Hartsog: Anything under new business? Mr. Dissen?

Mr. Dissen: No, sir.

Vice-Chairman Hartsog: Mr. Marshall?

Mr. Marshall: No, sir.

7. Next Meeting

Vice-Chairman Hartsog: Our next meeting is scheduled for Thursday, March 6, 2014, at 1:00 p.m.

I would ask that the Insurance Commissioner and Mr. Pauley cast a wide net with sending this out to your distribution lists and get as much feedback as we can for the next meeting on this concept that you're throwing out with regard to Rule 1. Are there any problems with March 6? [No problems with the March 6th meeting date.]

8. Executive Session

Vice-Chairman Hartsog: The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session. Is there a motion to go into Executive Session?

Mr. Dissen: So moved.

Mr. Marshall: Second.

Vice-Chairman Hartsog: A motion has been made and seconded to go into Executive Session. All in favor, "aye." Motion passed. We will now go into Executive Session.

[The Executive Session began at 1:30 p.m. and ended at 1:42 p.m.]

9. Adjourn

Vice-Chairman Hartsog: We are now out of Executive Session. Is there a motion for adjournment?

Mr. Dissen made the motion to adjourn. The motion was seconded by Mr. Marshall and passed unanimously.

There being no further business the meeting adjourned at 1:43 p.m.